



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 163 OF 2013**

HAFSWA MOHAMOUD ABDALLA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an Appeal from the proceedings and Judgment/Sentence of Hon. Acting Chief Magistrate D.A. Okundi (Mrs) delivered on 10<sup>th</sup> September, 2013 in Criminal Case No. 1377 of 2013 – Nairobi)*

**JUDGMENT**

The appellant Swabrinah Mohamed Yusuf Alias Hafswa Mohamoud Abdalla was charged with the offence of possessing a passport purporting to establish her identity contrary to Section 54 (1) (I) of the Kenya Citizenship and Immigration Act, 2011. It was alleged in particulars of the charge that on 8<sup>th</sup> September, 2013 at Jomo Kenyatta International Airport Nairobi, being a Kenyan National she was found possessing and using a British Passport No. **[Particulars withheld]** issued to one Hafswa Mohamoud Abdalla while departing to London using the said passport.

The record before me shows that the charge was read over to the appellant in Kiswahili language and that she pleaded guilty to the charge. The prosecutor then stated the facts which the appellant admitted. She was then convicted on her own plea of guilty and sentenced to pay a fine of Kshs. 2 Million in default to serve 2 years imprisonment.

Following the said conviction and sentence, the appellant lodged this appeal. In her petition of appeal, the appellant faulted the learned trial magistrate for allowing a plea to be taken when the charge sheet was bad in law and did not disclose that an offence had been committed by the appellant. She also complained that the learned trial magistrate erred in law and fact for allowing the charge to be read as drawn, whereas it was not proper and lawful as it did not disclose a material subsection of the law thus leading to a miscarriage of justice. It is also the appellant's complaint that the learned trial magistrate erred in law and in fact in finding that the evidence and facts availed supported the charge and convicting her on evidence that did not amount to commission of any offence.

The learned trial magistrate has also been faulted for convicting the appellant on a plea which was not unequivocal in light of the fact that crucial exhibits were not produced to support the charge. Finally the sentence imposed was wrong, unlawful and not supported by any law.

At the hearing of this appeal the learned counsel for the appellant advanced only two of the grounds set out in the petition of appeal that is, that the learned trial magistrate erred in convicting the appellant yet not exhibit had been produced. He also submitted that the appellant is sickly and the sentence was excessive.

I have read the record before me and observed that the learned trial magistrate was careful enough to indicate the language used in the proceedings. The appellant was not represented but I have no doubt that she understood the proceedings. There is an omission in the charge in that it should have read that the offence was contrary to Section 54(1) (I) as read with subsection (2) of the same Section. That omission however was not prejudicial to the appellant.

The substratum of the charge was the British Passport that the appellant was said to have possessed. It

was incumbent for the prosecutor to table that passport before the court as an exhibit. It was also incumbent for the learned trial magistrate to ensure that the said exhibit was presented. In the absence of that document, however elaborate the facts may have been, a conviction cannot be sustained.

The learned counsel for the Republic concedes the appeal on the same grounds and with respect, I agree. Had the offending passport been produced the conviction would have been upheld. The sentence imposed was also lawful and within the provisions of the law. However, as the omission was fatal this appeal is allowed, conviction quashed and sentence set aside.

I note from the record that the appellant paid the fine. The same shall be refunded to her on production of the original receipt. Orders accordingly.

**Dated and delivered at Nairobi this 20<sup>th</sup> Day of February, 2014.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

a